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Supreme Court, U.S.
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No. 04-1198

IN THE

Supreme Court of the United States

John Melvin Alexander, *et al.*,
Petitioners,

v.

State of Oklahoma, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

Michael D. Hausfeld
Agnieszka M. Fryszman
Cohen Milstein Hausfeld & Toll, P.L.L.C.
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005

Charles J. Ogletree, Jr.
(Counsel of Record)
1575 Massachusetts Ave.
516 Hauser Hall
Cambridge, MA 02138
(617) 496-2054

Michele A. Roberts
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Ave. NW
Washington, DC 20007

Adjoa A. Aiyetoro
P.O. Box 90604
Washington, DC 20090

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REPLY BRIEF FOR THE PETITIONERS

The brief in opposition maintains the dismissive tone that, as the district court rightly recognized, "fuels the belief that the State and City are ignoring their moral responsibility for the Riot." Pet. App. 40a. This case not only involves the active participation of City and State officials in the murder of hundreds of African-Americans, but it also presents two questions that *squarely* fall within the heartland of this Court's certiorari criteria. The circuits are avowedly split six to five over the standard of appellate review to be applied to a district court's equitable tolling ruling. See Pet. 9-17. The circuits are moreover divided four to four over whether, under federal law, a tort claim accrues against the government when the plaintiff knows of her injury and its general cause or, alternatively, only when the plaintiff knows of the *government*'s responsibility for her injury. See *id.* 20-22. Both issues unquestionably arise frequently in an array of contexts (see *id.* 15, 20-22) and thus call out for resolution by this Court.

Beyond the particular questions presented, there is no dispute that this case presents a "question of exceptional importance." See Pet. App. 43a (Lucero, J., dissenting from denial of rehearing en banc)). It is a case of national importance and indeed singular significance to this country's African-American citizens and to the acknowledgment of the terrifying, murderous history of the Tulsa Race Riot of 1921. This Court should grant certiorari to decide the legal questions presented and, if appropriate, remand to the court of appeals for consideration of whether petitioners' claims are timely under the correct legal standard.

1. The BIO cannot, and does not, deny that this case squarely presents the important and recurring conflict over the proper standard of review for equitable tolling claims. Rather, it contends that the petition calls on this Court to "examine a voluminous evidentiary record to determine the validity of the independent conclusion of each of the two lower

courts that the extraordinary circumstances which made resort to the courts futile in the years immediately following the Riot had sufficiently dissipated by the end of the 1960's to restart the two-year statute of limitations." BIO 2. That characterization is doubly inaccurate. First, the petition presents questions of law, and it anticipates that, if certiorari is granted, this Court would follow its usual practice and remand the case to the court of appeals for application of the proper legal standard. See, *e.g.*, Pet. 15 ("Based on its past practice, the Court will likely decide the appropriate standard of review, then (if it agreed with petitioners that *de novo* review was appropriate) remand the case to the Tenth Circuit for further proceedings under that standard." (collecting cases)). Contra BIO 2 (asserting without explanation that "[p]etitioners truly dispute only the fact finding on this issue").[1]

Second, the very point of the first question presented is that "the two lower courts" did *not*, in fact, reach an "independent conclusion" regarding the application of equitable tolling. Contra BIO 2. Rather, the court of appeals avowedly applied abuse of discretion review (Pet. 10 (citing Pet. App. 15a, 9a), 16 (citing Pet. App. 8a, 11a, 15a, 17a)), in conflict with the *de novo* standard advocated by petitioners (*id.* 15 (citing Pet. C.A. Br. 14-15)) and applied by six other circuits (*id.* 11-13).

The BIO further contends that equitable tolling would be inappropriate because "[p]etitioners did not allege or even imply that they were prohibited from accessing the courts after the 1960s" and, moreover, until filing this suit petitioners failed to take "*any* action whatsoever to pursue his or her legal rights." BIO 2-3 (emphasis in original). In fact, petition-

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[1] It is nonetheless noteworthy that the BIO does not dispute petitioners' extensive showing that this is an ideal vehicle to decide the question presented because, under the proper legal standard, the district court's refusal to apply equitable tolling would be reversed. See Pet. 16-17.

ers repeatedly pressed precisely this point in the lower courts, arguing specifically that "[u]ntil the Commission issued its Report, and it was adopted by the State, the judicial system was closed to Plaintiffs' claims as the crucial facts that altered the entrenched public myths about the Riot were simply not available." Pet. C.A. Br. 27. See also *id.* 22, 32-33; Pet. 16-17. Further, as the petition explains – and the BIO fails to dispute – both the City and State repeatedly denied and covered up any involvement in, much less responsibility for, the Riot right up until the Commission issued its report in 2001. See Pet. 16-17.

2. The BIO disputes that this case actually presents the second question: whether a tort claim against the government arises under federal law notwithstanding that the plaintiff does not know of the government's responsibility for her injuries. The BIO (at 3) characterizes as "simply not true" the petition's statement (at 20 n.4) that "[i]n the context of *accrual*, the Tenth Circuit deemed it entirely irrelevant that petitioners did not know prior to 2001 of the government's role in the Tulsa Riot." The BIO baldly asserts that petitioners "misrepresent" the Tenth Circuit's actual holding. BIO 3.

In fact, the petition's characterization of the Tenth Circuit's decision is entirely accurate, and the BIO notably fails to cite any portion of the opinion below in support of respondent's denial. The court of appeals held that a claim accrues when the plaintiff "knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm," such that "a plaintiff need not have conclusive evidence of the cause of an injury in order to trigger the statute of limitations." Pet. App. 9a-10a. In this case in particular, the court of appeals held that it was sufficient that petitioners' injuries were "public and obvious." *Id.* 10a & n.4.

The BIO instead relies on the fact that "the *trial judge* noted in his Order that the wording of the Complaint vividly demonstrates cause to conclude that the Plaintiffs' knowledge of the City's role and the participation of the National Guard

in the riot cannot be credibly disputed." BIO 3 (emphasis added). Of course, the district judge's characterization of the Complaint has nothing to do with the legal rule adopted by the court of appeals, and hence the circuit conflict presented by this case. Moreover, the Complaint in fact alleges precisely the opposite – that victims of the Riot were unaware of the government's responsibility. Second Amend. Compl. ¶¶ 527, 533. The Complaint's assertion in that respect is very substantially supported by the State Legislature's acknowledgment in 2001 – which the BIO ignores altogether – that the government had until that time suppressed the truth and blamed the victims. See Pet. 17.

The BIO further makes much of the fact that the Riot "was an open and notorious event," given that "the city was interrupted by widespread gunfire and a substantial portion of the city burned to the ground," events widely "reported." Pet. 17. But the gravamen of petitioners' complaint is obviously not that they were unaware of the Riot – petitioners' property was destroyed and their family members viciously murdered in cold blood with the substantial involvement of respondents. Rather, petitioners were unaware of the responsibility of the City and State for the Riot and they were (as the lower courts found but the BIO refuses to acknowledge) precluded by pervasive discrimination at the time from vindicating their rights.

The BIO also emphasizes (at 1-2) that a number of African-Americans in Tulsa sued their insurance companies and the City in 1923, presumably to suggest that petitioners' claims arose at that time. Notably, however, no such suits were filed against the State then; indeed, the State's involvement in the Riot remained unknown at that time.

And even with regard to the City, *neither* of the lower courts accepted this argument, and rightly so. They both recognized that the state courts at the time were equally complicit in depriving African-Americans of redress. See Pet. App. 15a (deeming "true" petitioners' assertion that the earlier complaints were "futile"); *id.* 37a ("The political and so-

cial climate after the Riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights."). If the point of the BIO is instead that these suits suggest that the African-American community as a whole was aware of the City's responsibility at the time, it is substantially overstated: the suits suggest at most that some individuals believed that the City was in some respect culpable. Even assuming *arguendo* that some victims did suspect the City's culpability in the 1920s, there was no sufficient evidence to substantiate those suspicions. It is thus undisputed that the government covered up its role until the Commission Report ended the "conspiracy of silence" in 2001, that the suits were uniformly ignored by the judiciary and the City (which indeed refused even to *respond* to any of them) and were all unsuccessful, that the government falsely put the blame on the victims, and that the Commission specifically found that records of the suits were unavailable to the African-American community. See Pet. 2-3; *id.* 16-17; Tulsa Race Riot: A Report by the The Oklahoma Commission To Study The Tulsa Race Riot Of 1921, at 4 (Feb. 28, 2001) *available at* www.okhistory.mus.ok.us/trrc/freport.pdf.

In any event, even the district court found that the statute of limitations was tolled until the 1960s. Thus, the only real issue with regard to the City is not whether the statute of limitations expired during the 1920s, but instead whether there is a factual dispute about whether circumstances changed during the 1960s. Even if the City's argument had any merit, it would properly be resolved on remand by the court of appeals in the first instance.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

Michael D. Hausfeld
Agnieszka M. Fryszman
Cohen Milstein Hausfeld & Toll, P.L.L.C.
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005

Michele A. Roberts
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Ave. NW
Washington, DC 20007

Charles J. Ogletree, Jr.
(Counsel of Record)
1575 Massachusetts Ave.
516 Hauser Hall
Cambridge, MA 02138
(617) 496-2054

Adjoa A. Aiyetoro
P.O. Box 90604
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